A **WESTFORM FAR EAST SDN BHD**

v.

CONNAUGHT HEIGHTS SDN BHD

B COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HISHAMUDIN MOHD YUNUS JCA
AZHAR MA'AH JCA
[CIVIL APPEALS NOS: W-03-212-2006,
C W-03-213-2006, W-03-214-2006 & W-03-215-2006]
17 DECEMBER 2009

CIVIL PROCEDURE*: Injunction - Injunction to restrain winding-up petition - Abuse of process of court - What constitutes abuse - Test to be*
D *applied - Rules of the High Court 1980*

CIVIL PROCEDURE: *Injunction - Ex parte interim injunction - Whether mandatory to give notice to other party - Supporting affidavit - Requirements of statement in supporting affidavit - Rules of the High Court 1980, O. 29 r. 1(2) & (2A)*
E

CIVIL PROCEDURE: *Appeal - Appeal against exercise of judicial discretion in interlocutory matter - Grant of ex parte injunction - Function of appeal court - Whether trial judge had committed error of law or misconceived facts*
F

COMPANY LAW: *Winding up - Application to injunct presentation of winding-up petition - Dispute regarding debt - Whether winding-up application an abuse of process - What constitutes abuse - Test to be applied - Companies Act 1965, s. 218*
G

CONTRACT: *Building contract - Persatuan Arkitek Malaysia standard form contract - Clause 30.3(i) - Whether clause qualified or unequivocal - Whether monies can be withheld by developer under interim certificate - Effect of cls. 22.1, 27.4 and 30.5(ii) - Persatuan Arkitek Malaysia*
H *contract, cls. 22.1, 27.4, 30.3(i) & 30.5(ii)*

The respondent ('developer') was the developer for a housing project and had appointed the appellant ('contractor') as the main contractor under a Persatuan Arkitek Malaysia Standard Form Agreement ('contract') which included *inter alia*, a liquidated
I damages clause. Due to serious problems that arose during

execution of the works, a supplemental agreement was executed by the parties to extend the completion date. The agreement stipulated that the developer was to pay the contractor compensation of RM1.4m, and that the developer would have the right to re-impose liquidated damages at the rate of RM10,000 per day per block if the contractor failed to complete the project, and in the event the contractor were to terminate the contract, the contractor was, *inter alia*, to refund all monies paid as compensation by the developer.

The developer duly paid the contractor RM1.4m and also made several direct payments to the contractor's suppliers and sub-contractors at the behest of the contractor. The contractor failed to complete the works by the agreed extended completion date and the developer's architect issued a certificate of non-completion and informed the contractor that it was invoking its right to impose liquidated damages.

The contractor subsequently claimed for the payment of certain interim certificates. The developer refused to pay the same, claiming a right of set-off in relation to the payments made to sub-contractors and suppliers as requested by the contractor. The contractor thereupon terminated the contract and subsequently issued two winding-up notices on the developer under s. 218 of the Companies Act 1965.

The developer applied for *ex parte* injunctions to prevent the winding-up proceedings until after final judgment had been obtained relating to the claims, on the grounds that it had only a limited time to obtain the injunctions before expiry of the 21-day period under the s. 218 notices.

The High Court allowed the developer's *ex parte* applications and subsequently, at the *inter partes* hearing, confirmed the injunctions while at the same time dismissing the contractor's application to set aside the *ex parte* injunctions.

The contractor has filed four appeals against the judge's orders, two appeals being in relation to the *ex parte* injunctions and two in relation to the *inter partes* injunctions, on the grounds, *inter alia*, that the judge had erred when he failed to hold that the developer's failure to give notice to the contractor for the *ex parte* applications was fatal.

Held (dismissing the appeals with costs – the appeals against the *ex parte* orders dismissed by majority; the appeals against the *inter partes* orders dismissed unanimously)
Per Suriyadi Halim Omar (Azhar Ma'ah JJCA concurring) delivering judgment of the majority:

(1) The court could not detect any mandatory requirement promulgated by Parliament demanding notice under O. 29 r. 1(2A)(c) of the Rules of the High Court 1980 ('RHC') irrespective of circumstances. What is mandatory is that the supporting affidavit in an *ex parte* application must contain a clear and concise statement about the reason(s) why notice has not been given. *Delimec Hygiene Sdn Bhd v. EMIC (M) Sdn Bhd* (foll).

(2) As the contractor had rejected every reasonable explanation and request of the developer to defer action on its s. 218 winding-up notices, the developer's urgency and justification for the *ex parte* applications was more than sufficiently established. The discretion whether to grant an interlocutory injunction is vested in the High Court judge and not the appellate court, whose function is only to review whether the judge had committed an error of law or misconceived the facts. No error or misconception was detected in this case. *S&F International Ltd v. Trans-con Engineering Sdn Bhd* (foll).

(3) It is the statutory right of a petitioner to apply for a winding-up order. To succeed in restraining such application by way of injunction whether *ex parte* or *inter partes*, the applicant must establish that the winding-up petition would be a *prima facie* abuse of the process of the court, eg where the debt is disputed or the applicant is solvent. The guidelines of *American Cynamide Co. v. Ethicon Ltd* and *Keet Gerald Francis v. Mohd Noor* which require a 'serious question to be tried' would not be applicable to applications to restrain a winding-up petition such as the current one, which seeks to stop proceedings *in limine*. *A Company, Re* (foll)*; Coulan Sanderson & Ward Ltd v. Ward* (foll)*; Molop Corp Sdn Bhd v. Uniperkasa (M) Sdn Bhd* (foll)*; Natseven TV Sdn Bhd v. Television New Zealand Ltd* (foll)*; Pengkalen Securities Sdn Bhd v. Leow Li Lain* (foll)*; Tan Kok Tong v. Hoe Hong Trading Sdn Bhd* (foll)*; American Cynamid Co v. Ethicon Ltd* (dist)*; Keet Gerald Francis v. Mohd Noor* (dist).

(4) Despite cl. 30.3(i) of the contract which states that the developer was not allowed to withhold, deduct or set-off any monies due to the contractor under an interim certificate, the effect of cls. 22.1, 27.4 and 30.5(ii) of the contract was to allow the developer to set-off monies in certain circumstances.

(5) From the totality of the evidence there was clearly a genuine dispute as to the debts in question and the contractor had not adequately established the insolvency of the developer. The learned judge had exercised his discretion correctly in granting the orders for the *ex parte* and *inter partes* injunctions.

Held (allowing the appeals against the *ex parte* orders with costs; dismissing the appeals against the *inter partes* orders with costs)

Per Hishamudin Mohd Yunus JCA delivering separate and partially dissenting judgment:

(1) By reason of O. 29 r. 1(2) of the RHC, an *ex parte* application for an interlocutory injunction must be made only in exceptional circumstances. The court must critically examine the justification given by the applicant (who bears the legal burden) always bearing in mind that an *ex parte* interlocutory injunction order is drastic in nature. The *ex parte* application need not be served on the other side and one needs only to inform the affected party even by means of a mere phone call.

(2) If the plaintiff informs the defendant of its *ex parte* application, the latter would have the opportunity to be present at the *ex parte* hearing and may apply for the application to be heard on an *ex parte* opposed basis, which will not involve the filing of affidavits by the defendant. It does not mean that where the other party is informed, an *ex parte* application would automatically become an inter partes application. An *ex parte* application will remain an *ex parte* application until ordered by the court to be *inter partes*.

(3) The period of 21 days is relatively a long time and there was ample time to make an *inter partes* application. Furthermore, as the *ex parte* application was heard seven days after it was filed, the developer had ample time to notify the contractor of the application. The legal burden is on the developer to convince the court that the case is one of urgency and it had failed to do so as its reasons were unclear and unconvincing.

(4) As a rule, O. 29 r. 1(2A)(c) imposes a mandatory duty on the plaintiff to notify the defendant of its *ex parte* application. It is only in exceptional circumstances that the plaintiff is excused from notifying the defendant and, in such circumstances, the plaintiff must in its affidavit give a plausible reason and not just any reason. No plausible reason has been given by the developer. The *ex parte* orders should therefore have been set aside. *University of Malaya Medical Centre v. Choo Chee Kon* (foll).

(5) A court of law must respect and protect a defendant's right to file a winding-up petition under s. 218 of the Companies Act if the defendant honestly believes that it has the right to do so, as long as the exercise of such a right is not an abuse of process. The party who alleges that there is a *prima facie* abuse of process must satisfy the court with clear and persuasive grounds. *Bryanston Finance v. De Vries (No. 2)* (foll)*; Homestead Assets Sdn Bhd v. Contramec Sdn Bhd* (foll).

(6) The facts and developer's evidence showed that the intended winding-up petitions would *prima facie* constitute abuses of process as the true position in law is that silence or failure to reply to a claim does not mean that the claim is admitted or undisputed and furthermore cl. 30.3(i) of the contract contained a qualification and was not unequivocal. The appeals against the *inter partes* injunctions were therefore dismissed.

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Responden ('pemaju') adakah pemaju untuk sebuah projek perumahan dan telah melantik perayu ('kontraktor') sebagai kontraktor utama di bawah suatu perjanjian format piawai Persatuan Arkitek Malaysia ('kontrak') yang termasuk antara lain, suatu fasal ganti rugi terbubar. Akibat suatu masalah serius yang timbul semasa pelaksanaan kerja-kerja itu, suatu perjanjian tambahan dilaksanakan oleh pihak-pihak untuk melanjutkan tarikh persiapan. Perjanjian itu menyatakan bahawa pemaju akan membayar kontraktor pampasan sebanyak RM1.4 juta, dan bahawa pemaju berhak mengenakan ganti rugi terbubar pada kadar RM10,000 bagi setiap hari setiap blok jika kontraktor gagal untuk

menyiapkan projek itu, dan jikalau kontraktor menamatkan kontrak itu, kontraktor mesti, antara lain, membayar balik semua wang pampasan yang dibayar oleh pemaju.

Pemaju membayar kontraktor RM1.4 juta dan juga membuat beberapa bayaran terus kepada pembekal dan sub-kontraktor pihak kontraktor apabila diminta berbuat sedemikian oleh kontraktor. Kontraktor gagal menyelesaikan kerja-kerja itu sebelum tarikh persiapan yang dilanjutkan dan arkitek pemaju mengeluarkan suatu sijil ketaksiapan dan memberitahu kontraktor bahawa pemaju ingin menimbulkan haknya untuk menuntut ganti rugi terbubar.

Kontraktor kemudiannya membuat tuntutan di bawah sijil-sijil sementara tertentu. Pemaju enggan membayar dan menegaskan bahawa ia mempunyai hak imbangan berkaitan dengan bayaran yang dibuat kepada sub-kontraktor dan pembekal sepertimana yang dipohon oleh kontraktor. Kontraktor sesudah itu menamatkan kontrak dan kemudiannya mengeluarkan dua notis penggulungan terhadap pemaju di bawah s. 218 Akta Syarikat 1965.

Pemaju telah membuat permohonan untuk injunksi secara *ex parte* dengan tujuan menghalang penjalanan prosiding penggulungan sehingga penghakiman muktamad diperolehi berkaitan dengan tuntutan-tuntutan kontraktor, atas alasan bahawa ia hanya mempunyai masa yang terhad untuk memperolehi injunksi itu sebelum tamat tempoh 21 hari di bawah notis-notis s. 218 tersebut.

Mahkamah Tinggi membenarkan permohonan *ex parte* pemaju dan kemudiannya, pada perbicaraan antara pihak, mengesahkan injunksi-injunksi tersebut dan pada masa yang sama telah menolak permohonan kontraktor untuk membatalkan injunksi *ex parte* tersebut.

Kontraktor telah membawa empat rayuan terhadap perintah-perintah hakim. Dua rayuan berkaitan dengan injunksi *ex parte* dan dua berkaitan dengan injunksi antara pihak. Alasan yang dikemukakan termasuk, antara lain, bahawa hakim telah tersilap apabila beliau gagal untuk memutuskan bahawa kegagalan pemaju untuk memberi notis kepada kontraktor berkenaan dengan injunksi *ex parte* tersebut semestinya menggagalkan permohonan pemaju.

Diputuskan (menolak rayuan-rayuan dengan kos – rayuan terhadap perintah-perintah *ex parte* ditolak oleh majoriti; rayuan terhadap perintah-perintah *inter partes* ditolak sebulat suara)

Oleh Suriyadi Halim Omar (Azhar Hj Ma'ah HHMR menyetujui) menyampaikan penghakiman majoriti:

(1) Mahkamah tidak dapat mengesan sebarang keperluan mandatori oleh Parlimen yang memerlukan supaya notis diberikan di bawah A. 29 k. 1(2A)(c) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') tanpa mengira keadaan sekeliling. Apa yang menjadi mandatori adalah keperluan bahawa afidavit sokongan yang berkaitan dengan suatu permohonan *ex parte* mesti mengandungi suatu kenyataan yang jelas dan ringkas tentang sebab mengapa notis tidak diberikan kepada pihak yang bertentangan. *Delimec Hygiene Sdn Bhd v. EMIC (M) Sdn Bhd* (diikuti).

(2) Oleh kerana kontraktor telah menolak setiap penjelasan dan permintaan munasabah daripada pemaju untuk menangguhkan tindakannya berkaitan dengan notis-notis penggulungan di bawah s. 218, pemaju berjaya menunjukkan kemustahakan dan justifikasinya dalam membuat permohonan secara *ex parte*. Budi bicara samada untuk membenarkan suatu injunksi interlokutori diberikan kepada hakim Mahkamah Tinggi dan bukannya kepada mahkamah rayuan, yang berfungsi hanya untuk mengkaji semula samada hakim telah melakukan sebarang kesilapan undang-undang atau salah memahami fakta-fakta. Tiada kesilapan atau salah fahaman yang dikesan di dalam kes ini. *S&F International Ltd v. Trans-con Engineering Sdn Bhd* (diikuti).

(3) Ianya menjadi hak statutori seorang pempetisyen untuk memohon suatu perintah penggulungan. Supaya berjaya menahan permohonan sedemikian melalui suatu injunksi yang dibawa secara *ex parte* ataupun antara pihak, pemohon mesti menunjukkan bahawa petisyen penggulungan tersebut akan merupakan suatu penyalahgunaan proses mahkamah *prima facie*, misalnya di mana hutang itu dipertikaikan ataupun pemohon adalah solven. Garis-garis panduan yang dinyatakan di dalam kes-kes *American Cynamide Co. v. Ethicon Ltd* dan *Keet Gerald Francis v. Mohd Noor* yang memerlukan suatu 'persoalan

serius untuk dibicarakan' tidak terpakai kepada permohonan untuk menahan petisyen penggulungan seperti permohonan ini, yang bertujuan untuk menghentikan prosiding dari permulaannya. *A Company, Re* (diikuti); *Coulan Sanderson & Ward Ltd v. Ward* (diikuti); *Molop Corp Sdn Bhd v. Uniperkasa (M) Sdn Bhd* (diikuti); *Natseven TV Sdn Bhd v. Television New Zealand Ltd* (diikuti); *Pengkalen Securities Sdn Bhd v. Leow Li Lain* (diikuti); *Tan Kok Tong v. Hoe Hong Trading Sdn Bhd* (diikuti); *American Cynamid Co. v. Ethicon Ltd* (dibezakan); *Keet Gerald Francis v. Mohd Noor* (dibezakan).

(4) Walaupun fasal 30.3(i) kontrak menyatakan bahawa pemaju tidak dibenarkan menahan, menolak atau mengimbangi sebarang jumlah yang kena dibayar kepada kontraktor di bawah suatu sijil sementara, fasal-fasal 22.1, 27.4 dan 30.5(ii) kontrak berkesan untuk membenarkan pemaju membuat tolakan perseimbangan dalam keadaan tertentu.

(5) Dengan mengambil keseluruhan bukti, adalah jelas bahawa terdapat suatu perselisihan nyata mengenai hutang tersebut. Lagipun, kontraktor tidak berjaya membuktikan insolvensi pemaju dengan secukupnya. Hakim telah menggunakan budi bicaranya secara betul apabila membenarkan injunksi *ex parte* dan injunksi antara pihak.

Diputuskan (membenarkan rayuan terhadap perintah-perintah *ex parte* dengan kos; menolak rayuan terhadap perintah-perintah *inter partes* dengan kos)

Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman berasingan yang sebahagiannya bertentangan:

(1) Aturan 29 k. 1(2) KMT menetapkan bahawa suatu permohonan *ex parte* untuk injunksi interlokutori boleh dibuat hanya dalam keadaan luar biasa. Mahkamah mesti meneliti secara kritis justifikasi yang diberikan oleh pemohon (yang menanggung beban bukti di sisi undang-undang) dan selalu mengingati bahawa suatu perintah injunksi interlocutori *ex parte* bersifat drastik. Permohonan *ex parte* tidak perlu disampaikan kepada pihak bertentangan dan pemohon hanya perlu memberitahu pihak yang terjejas walaujua hanya melalui suatu panggilan telefon.

(2) Jika plaintif memberitahu defendan tentang permohonan *ex parte*nya, defendan berpeluang hadir di perbicaraan *ex parte* tersebut dan boleh memohon supaya permohonan itu didengar secara *ex parte* ditentang, yang tidak akan melibatkan pemfailan afidavit-afidavit oleh defendan. Ia tidak bermaksud bahawa di mana pihak lain diberitahu, permohonan *ex parte* tersebut akan secara automatik menjadi suatu permohonan antara pihak. Suatu permohonan *ex parte* akan kekal suatu permohonan *ex parte* sehingga diarahkan oleh mahkamah menjadi antara pihak.

(3) Tempoh 21 hari agaknya lama dan terdapat cukup masa untuk membuat suatu permohonan antara pihak. Tambahan pula, oleh kerana permohonan *ex parte* hanya dibicarakan tujuh hari selepas ia difailkan, pemaju mempunyai cukup masa untuk memberitahu kontraktor tentang permohonan tersebut. Pemaju menanggung beban untuk meyakinkan mahkamah tentang kemustahakan kesnya tetapi beliau gagal berbuat demikian kerana alasan yang diberikan olehnya tidak jelas dan tidak meyakinkan.

(4) Pada amnya, A. 29 k. 1(2A)(c) mengenakan tanggungjawab mandatori ke atas plaintif untuk memberitahu defendan tentang permohonannya yang dibuat secara *ex parte*. Plaintif dimaafkan dari memberitahu defendan hanya dalam keadaan luar biasa dan, dalam keadaan sedemikian, plaintif mesti di dalam afidavitnya memberi sebab yang munasabah dan bukannya apa-apa sebab sahaja. Tiada sebab munasabah yang telah diberikan oleh pemaju. Oleh itu, perintah-perintah *ex parte* tersebut seharusnya dibatalkan. *University of Malaya Medical Centre v. Choo Chee Kon* (diikuti).

(5) Sesebuah mahkamah undang-undang mesti menghormati dan melindungi hak defendan untuk memfailkan petisyen penggulungan di bawah s. 218 Akta Syarikat jika defendan benar-benar percaya bahawa ia berhak berbuat demikian, selagi penggunaan hak tersebut tidak merupakan suatu penyalahgunaan proses. Pihak yang mengatakan bahawa terdapat suatu penyalahgunaan proses yang *prima facie* mestilah memuaskan mahkamah dengan alasan-alasan yang jelas dan meyakinkan. *Bryanston Finance v. De Vries (No. 2)* (diikuti)*; Homestead Assets Sdn. Bhd. v. Contramec Sdn. Bhd.* (diikuti).

(6) Fakta-fakta kes dan bukti yang dikemukakan oleh pemaju menunjukkan bahawa petisyen-petisyen penggulungan akan *prima facie* merupakan penyalahgunaan proses kerana kedudukan sebenar di sisi undang-undang adalah bahawa kesenyapan atau kegagalan untuk menjawab kepada suatu tuntutan tidak bermaksud bahawa tuntutan itu diakui atau tidak dipertikaikan, dan tambahan pula fasal 30.3(i) kontrak itu mengandungi satu kekecualian dan bukannya tanpa syarat. Oleh yang demikian, rayuan-rayuan terhadap injunksi antara pihak ditolak.

Case(s) referred to:

American Cynamid Co v. Ethicon Ltd [1975] 2 WLR 316 ***(dist)***
Bryanston Finance v. De Vries (No 2) [1976] 1 Ch 63 CA ***(foll)***
Coulan Sanderson & Ward Ltd v. Ward [1986] BCC 99 ***(foll)***
Delimec Hygiene Sdn Bhd v. EMIC (M) Sdn Bhd [2001] 5 MLJ 186 ***(foll)***
Homestead Assets Sdn Bhd v. Contramec Sdn Bhd [2009] 8 CLJ 227 HC ***(foll)***
Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(dist)***
Malayan Flour Mill Bhd v. Raja Lope & Tan Co [2000] 7 CLJ 288 HC ***(refd)***
Molop Corp Sdn Bhd v. Uniperkasa (M) Sdn Bhd [2003] 6 MLJ 311 ***(foll)***
Motor Sports International Ltd & Ors v. Delcont (M) Sdn Bhd [1996] 3 CLJ 483 CA ***(refd)***
Natseven TV Sdn Bhd v. Television New Zealand Ltd [2001] 4 CLJ 722 HC ***(foll)***
Pengkalen Securities Sdn Bhd v. Leow Li Lain [1997] 5 CLJ 440 HC ***(foll)***
Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 SC ***(refd)***
Re A Company [1995] 1 WLR 953 ***(foll)***
S&F International Ltd v. Trans-con Engineering Sdn Bhd [1985] 1 MLJ 62 ***(foll)***
Sime Engineering Sdn Bhd v. RM Leopad Sdn Bhd (No 2) [2005] 5 CLJ 274 HC ***(refd)***
Tan Kok Tong v. Hoe Hong Trading Sdn Bhd [2007] 2 CLJ 305 CA ***(foll)***
University of Malaya Medical Centre v. Choo Chee Kon & Anor [2008] 5 CLJ 295 HC ***(foll)***

Legislation referred to:

Companies Act 1965, s. 218(1)(e)
Rules of the High Court 1980, O. 29 r. 1(2), (2A)(c)

Other source(s) referred to:
Malaysian High Court Practice, 2001 Desk Edition 1, p 1032

For the appellant - Chu Ai Li (Chin Hui Juin with her); M/s Azman, Davidson & Co
For the respondent - Rodney Gomez (Alexius Lee with him); M/s Shearn Delamore

[Appeal from High Court, Kuala Lumpur; Originating Summons No: D5-24-307-2006 & D5-24-306-2006]

Reported by Anne Khoo

JUDGMENT

Suriyadi Halim Omar JCA:

[1] There were four appeals filed by the defendant (hereinafter referred to as the appellant) before us *viz.*:

i. W-03-212-2006 against the learned judge's order dated 20 November 2006, which *inter alia* granted an *inter partes* injunction restraining the appellant from presenting a winding-up petition against the plaintiff (hereinafter referred to as the respondent) for the sum of RM3,371,251.17 stated in a notice under s. 218 of the Companies Act 1965 under interim certificate 42;

ii. W-03-213-2006 against the learned judge's orders *inter alia* for not holding that failure to give notice to the appellant for the earlier *ex parte* application for injunction based on the above notice of s. 218 of the Companies Act 1965 was fatal;

iii. W-03-214-2006 against the learned judge's order dated 20 November 2006 dismissing the appellant's application to set aside the *ex parte* injunction order of 25 August 2006 relating to a notice under s. 218 of the Companies Act 1965 for a sum of RM711,993.69; and

iv. W-03-215-2006 filed by the appellant against the learned judge's order dated 20 November 2006, which *inter alia* granted an *inter partes* injunction to restrain the appellant from presenting a winding-up petition against the respondent for the above sum of RM711,993.69.

[2] We heard all the four appeals and at the conclusion of the hearing unanimously dismissed appeals W-03-212-2006 and W-03-215-2006. By majority, we likewise dismissed W-03-213-2006 and W-03-214-2006. Deposits of these appeals went towards the account of taxed costs.

[3] Before touching on the facts of the appeals I would like to briefly discuss the issue of want of notice for the *ex parte* injunctions, which was vehemently ventilated by the appellant. The appellant had submitted with particular reference to appeals W-03-213-2006 and W-03-214-2006 that the learned judge had erred when he failed to hold that the respondent's failure to give notice to the appellant for the respective *ex parte* applications was fatal. The basis of this legal argument was the case of *University of Malaya Medical Centre v. Choo Chee Kon & Anor* [2008] 5 CLJ 295 where Hishamudin Mohd Yunus J (as he then was), had opined that on the facts of that case the failure to give notice was clearly not satisfactory. The learned judge had remarked:

> In my judgment, compliance with r. 1(2A)(c) is mandatory. If there had been non-compliance, it is a very serious breach of the Rules of the High Court and the *ex parte* order must be set aside. This approach is consistent with the policy behind the introduction of r. 1 (2A). I therefore, set aside the *ex parte* injunction order due to non-compliance of r. 1(2A)(c) of the RHC.

[4] Prior to making the above remark, and in support of it, the learned judge had referred to the *Malaysian High Court Practice,* 2001 Desk Edition 1 at p. 1032 before concluding r. 1(2A)(c) of the Rules of the High Court 1980 being mandatory. The said p. 1032 reads:

> The requirements in r. 1(2A) are mandatory. Thus, where a plaintiff fails to give notice of an application made *ex parte* out of fear that it will defeat the purpose of the proceedings, the plaintiff must state in his supporting affidavit the reasons why notice in advance was not given to the defendant. As the introductory sentence in r. 1(2A) states that the affidavit 'shall contain a clear and concise statement', the statement must be stated clearly and concisely and may not be implied: *Delimec Hygiene Sdn Bhd v. EMIC (M) Sdn Bhd* [2001] 5 MLJ 186 at 197.
>
> The consequence of the plaintiff's failure to comply with r. 1(2A) is that the injunction must be discharged. To do otherwise would defeat the policy behind the introduction of r. 1(2A): *UMAS Sendirian Berhad v. RHB Bank Berhad & Anor* [2001] 1 AMR 1024.

[5] For completeness of explanation, I reproduce O. 29 r. 1(2) and (2A)(c) of the Rules of High Court 1980 and they read:

> (2) Where the applicant is the plaintiff and the case is one of urgency such application may be made *ex-parte* by summons supported by an affidavit but, except as aforesaid, such application must be made by summons.
>
> (2A) The affidavit in support shall contain a clear and concise statement:
>
> (c) of the facts relied on as justifying application *ex-parte*, including details of any notice given to the defendant or, if none has been given, the reason for giving none;

[6] Having read the above excerpt found in the *Malaysian High Court Practice*, 2001 Desk Edition 1, which endorsed that where there is failure to give notice of an application made *ex parte*, out of fear that it will defeat the purpose of the proceedings, the plaintiff (here the respondent) must state the reasons for that failure. In a nutshell in certain circumstances, conditional on reasons being supplied in the supporting affidavit, notice may be dispensed with, it being one of the reasons justifying the *ex parte* application. There is no difficulty in interpreting the above statement and no in-depth judicial activism is needed. It must be understood that prior to granting an injunctive order, what with the affected party being absent, and hence bereft of its stance, much reliance will be put on the supporting affidavit by the learned judge. The information supplied, agreeably, as to why no notice was sent, would help the judge in no small way when meting down the necessary order.

[7] To continue with this issue, reading the *Malaysian High Court Practice,* 2001 Desk Edition 1, or r. 1(2A)(c) of the RHC 1980, I failed to detect any mandatory requirement promulgated by Parliament demanding notice irrespective of circumstances. What is mandatory, as explained by *Delimec Hygiene Sdn Bhd v. EMIC (M) Sdn Bhd* [2001] 5 MLJ 186, which attempted to explain r. 1(2A)(c) of the RHC 1980, is that the statement must be stated clearly and concisely. That is all. I am unable to find anywhere in the above case any enunciation that a notice is mandatory prior to any *ex parte* injunction application.

[8] Permit me now to touch on the facts. The s. 218 notice was dated 7 August 2006 (with the expiry date being 28 August 2006). The respondent immediately responded on 11 August 2006 requesting the appellant not to pursue with the matter with the appellant replying on 14 August 2006 reiterating its stance. The respondent received this response on 15 August 2006. The predicament of the respondent are adequately explained, together with the reasons why notice was not given prior to filing the *ex parte* injunction application at p. 165 para. (c) vol. 3 of the appeal records. They read as follows:

> (c) As the plaintiff only has a limited time, that is until 28.8.2006 to obtain this injunction, the plaintiff did not have time to inform the defendant of this application for an injunction. If the defendant was informed of this application, and was to file affidavits to oppose it, this application would certainly not be heard before the said 21 day period expires. For this reason, this application for an injunction has to be heard *ex parte* in the first instance even though the defendant's solicitors in their letter dated 14.8.2006 at Exhibit "CCL-14" requested to be kept informed of any proceeding or applications filed against the defendant.

[9] Founded on the above facts, it was obvious that with the last date being 28 August 2006 and the appellant having refused to budge from their original stance of proceeding on with the s. 218 notice, the respondent had only 13 days more left. With the appellant having rejected every reasonable explanation and request of the respondent what could the latter have done? They were put in a predicament of having to incur incalculable losses and embarrassment for the company if no prompt action was undertaken. The requirement of urgency of the matter and justification of the application thus had been more than sufficiently established.

[10] Essentially too the appellant had been put to notice of a legal action if it refused to appreciate the explanation of the respondent. With a battery of lawyers handling the affairs of the appellant by no figment of the imagination that the appellant would be caught flat footed. It was obvious to any practitioner that in the context of this case, the only legal action anticipated must be an *ex parte* injunction.

[11] It must be understood, as regards the discretion of whether to grant an interlocutory injunction or not, is vested on the High Court judge and not the appellate court. Our function is only to review, and unless the judge has committed an error of law or misconceived the facts, we will not overrule his decision merely because we would have arrived at a different decision (*S&F International Ltd v. Trans-con Engineering Sdn Bhd* [1985] 1 MLJ 62). With such overwhelming facts confronting the learned judge it was no surprise that the presiding judge arrived at the conclusion that he did. Based on the above reasons I have no hesitation in rejecting the preliminary issue of notice.

[12] I now refer to the facts of the case that are applicable to all the four appeals. The respondent is the developer for a housing project and had appointed the appellant as the main contractor *vide* a letter of award dated 22 July 2002 (vol. 14 appeal record p. 1161). The salient terms of the letter of award are as follows:

(i) the Conditions of Contract is based on the "PAM Standard Form Agreement" ("Conditions of Contract") (Clause 3);

(ii) completion date is 31.3.2005 (Clause 6 (b));

(iii) liquidated and ascertained damages ("LAD") shall be levied at RM10,000.00 per day per block (Clause 10); and

(iv) with the permission of the Architect the plaintiff has the right to make direct payment to domestic contractors and the same shall be deducted from the defendant (Clause 15(a)).

[13] I herewith reproduce cls. 3, 6(b), 10 and 15(a):

3. Conditions Of Main Contract

(a) The contract conditions to be adopted for this contract shall be the PAM Standard Agreement and Conditions of Building Contract, Private Edition without Quantities.

...

6. Contract Period

(a) ...

(b) The date of site possession is fixed on 1st July 2002, the same date where the earthwork contractor took site possession. Thus, the completion date for the contract shall be 31st March 2005.

...

10. Liqudated Damages

(a) in the event of any delay by the Contractor in the completion of work, the liquidated damages shall be levied at RM10,000.00 per block per day.

...

15. Miscelleanous

(a) The Architect or Quantity Surveyor at any time before the issuance of the Certificate, may request the Contractor to furnish to him reasonable proof that all amounts stated as due and included in the previous certificates in respect of the total value of the work executed by domestic sub-contractor, materials or goods supplied by the domestic suppliers have been discharged. If the Contractor fails to comply with any such request, the Architect may issue a certificate to the effect and thereupon the Employer may himself pay such amounts to any domestic Sub-contractor/suppliers concerned and deduct the same from any sums due or do become due to the contractor. When the Architect is of the opinion that it is appropriate to do so, he may issue the aforesaid certificate irrespective of whether or not an Interim Certificate is due for issuance.

[14] Due to serious problems that arose during the execution of the works, a Supplemental Agreement was executed by the parties, which stipulated that the completion date be extended to 31 December 2005. That agreement also specified that the respondent was to pay the appellant monthly compensation, with the eventual sum grossing RM1,400,000 for the delayed period of six months. It was agreed too, amongst others that if the appellant failed to complete the project, the respondent would have the right to impose the liquidated damages at the rate of RM10,000 per day per block. In the event the appellant were to terminate the contract between them, it would not be entitled to any compensation from the respondent, and in return too, shall refund all monies paid as compensation by the former. After the execution of that Supplemental Agreement the respondent paid the appellant a total sum of RM1,400,000 as compensation. In the course of the contract *vide* letters, eg, dated 20 July 2005, the appellant requested the respondent to make direct payment to the suppliers and sub-contractors, which request was acquiesced to.

[15] A dispute thereafter ensued when the appellant failed to complete the works by the agreed date of 31 December 2005. It requested for another extension of time but was refused by the architect, who thereupon issued a Certificate of Non-Completion and informed the respondent of its right to impose the liquidated damages. I reproduce the relevant portion of that certificate which reads:

> Job Title and No: Proposed Construction of 3 Blocks of 850 Units of Medium Cost Apartment, 2 Blocks of 378 Units of Low Costs Flats, Infrastructure Services & Amenities On Part of Lot 18122, Mukim Petaling, Wilayah Persekutuan For Connaught Heights Sdn Bhd.
>
> To (Main Contractor): Westform Far East Sdn Bhd.
> 16-2 & 18-2A, Jalan 8/23E
> Taman Danau Kota, Setapak
> 53300 Kuala Lumpur
>
> In accordance with our Standard Form of Contracts, I/We hereby certify that works named as remaining works in the supplemental Agreement Dated 29/07/2005 ought to have been reasonably completed by 31/12/2005 have not been completed.
>
> I/We therefore declare that the Employer may deduct sum calculated at the rate stated in the Appendix of Contract from any Monies due or to become due to the Contractor, for as long as the works shall so remain incomplete.
>
> Signature: Ar. Chang Yuh Fah (Architect)

[16] The appellant subsequently claimed for the payments of certain interim certificates. The respondent refused to pay the same on the premise, *inter alia* that it had made direct payment to the sub-contractors and suppliers in July 2005, as requested by the appellant earlier, and stated that it had the right to deduct those payments from the appellant's claim. The appellant thereupon terminated the contract and the respondent appointed a new contractor to complete the construction works. After this termination of contract by the appellant, it submitted a claim under interim certificate no. 42, to be followed on 7 August 2006 by a s. 218 notice of the Companies Act 1965, against the respondent claiming RM3,371,251.17 founded on that interim certificate.

[17] On 18 August 2006, through an originating summons the respondent applied for an injunction to prevent the appellant from commencing winding up proceedings against it unless the appellant had obtained final judgment relating to the said debts. On 25 August 2006 an *ex parte* injunction was granted to the respondent, with 13 September 2006 fixed for the *inter partes* hearing. The appellant on 7 September 2006 applied to set aside the *ex parte* injunction and come the above date of 13 September 2006, the court ordered the injunction *ad interim*, until final disposal of the respondent's 18 August 2006 originating summons.

[18] During that *inter partes* hearing the respondent had alleged that a *bona fide* disputed debt existed, and that the appellant had failed to complete the construction works, and had also terminated the contract. On these grounds, it was further submitted that the appellant must in return pay the respondent the liquidated damages, together with the refund of the compensation as agreed in the Supplemental Agreement. The respondent further ventilated that any presentation of a winding up petition would be an abuse of the court's process as the dispute should be referred to arbitration pursuant to cl. 34. Finally it canvassed that as it was solvent at all material time the injunction should be allowed in order to preserve the *status quo*.

[19] At the stage of the *inter partes* hearing the learned judge also heard the setting aside application of the *ex parte* injunction. In the course of submitting on the setting aside of the *ex parte* injunction, the appellant asserted that apart from the fact that there were no special circumstances to support the *ex parte* application for the injunction, the respondent had failed to give notice to the appellant as required under O. 29 r. 1 of the Rules of the High Court 1980. The respondent too had failed to make full and frank disclosure that it was insolvent at the material time. Further, the respondent's application for an injunction was an abuse of the court's process, with such application not being made in the winding up court. Needless to say the appellant insisted that there was no substantial dispute as to the debt.

[20] To cut it short, on 10 November 2006 the High Court allowed the respondent's application for the *inter partes* injunction, and dismissed the appellant's application to have the *ex parte* injunctions set aside hence this appeal. I was unable to gauge the reasons for those orders as the learned judge failed to prepare any grounds of judgment.

A **Hearing Before This Panel**

[21] The appellant had ventilated, amongst others, before us that the learned judge had erred when in the course of granting the *inter partes* injunction, had failed to arrive at a few findings. He had
B failed, to start with, to hold that there was no *bona fide* dispute on the debt. Why this ground was submitted before us was obvious, as the appellant in its written submission did concede that the learned judge had wrongly applied the general principles for granting the interim or interlocutory injunction. The learned
C judge had alluded to the principles founded in *American Cynamid Co. v. Ethicon Ltd.* [1975] 2 WLR 316 and *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293.

[22] The appellant had ventilated that to succeed in its
D application for an injunction, the respondent must prove a *prima facie* case that winding up proceedings would fail, and would constitute an abuse of court process. The appellant brought our attention to *Bryanston Finance v. De Vries (No. 2)* [1976] 1 Ch 63 CA in support of that proposition. The facts of the latter case in
E brief are as follows. A minority shareholder (defendant) who merely held 62 shares out of 7,414,938 shares threatened to present a petition to wind up a company. The company promptly filed 'the first action', which was for an injunction to restrain the defendant from presenting a petition, and was successful. The application by
F the defendant to discharge that injunctive order was dismissed. Later a 'second action' for an injunction was filed restraining the defendant from presenting the petition on the grounds supplied in the four affidavits filed in the 'first action'. Again the plaintiff was successful. The defendant appealed against the judge's refusal to
G set aside the first injunction and the granting of the second one. The Court of Appeal dismissed the appeal of the 'first action' but allowed the appeal in the 'second action' on the premise that the plaintiff had failed to establish that the petition ought to be dismissed, *inter alia* on the ground of abuse of process of the
H court. In a word there was no clear and persuasive ground there to restrain a would-be petitioner from picking up his rights and filing his petition.

[23] I now return to our current appeal. In the midst of the hearing, the respondent's counsel had conceded that the principles
I of *Keet Gerald Francis* were inapplicable here. In agreement with the legal proposition of the appellant, conceded that to be

successful, the respondent had to establish on substantial ground, that a *bona fide* disputed debt existed, and that the petition would be an abuse of process. He on the other hand disagreed with the appellant's contention as to what constituted abuse of process, and disagreed that he had to establish that the petition was doomed to fail.

[24] On the stance as enunciated by *Bryanston Finance v. De Vries* we have no quarrel with it (see also *Coulan Sanderson & Ward Ltd v. Ward* [1986] BCC 99; *Re A Company* [1995] 1 WLR 953). Buckley LJ pertinently had said:

> ... the court should not, in my judgment, interfere with what would otherwise be a legitimate approach to the seat of justice unless the evidence is sufficient to establish *prima facie* that the plaintiffs will succeed in establishing that the proceedings sought to be restrained would constitute an abuse of process.

[25] In *Natseven TV Sdn Bhd v. Television New Zealand Ltd* [2001] 4 CLJ 722 Low Hop Bing J (as he then was) had occasion to endorse the above view to be reiterated in *Molop Corp Sdn Bhd v. Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311. This latter case was cited with approval in *Tan Kok Tong v. Hoe Hong Trading Sdn Bhd* [2007] 2 CLJ 305 when the Court of Appeal remarked:

> In *Molop Corp Sdn Bhd v. Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311 Low Hop Bing J (as he then was) correctly held as follows:
>
> > In *Natseven TV Sdn Bhd v. Television New Zealand Ltd* [2001] 4 CLJ 722, I had the occasion to consider and determine the burden of proof cast on the plaintiff in an application for interlocutory injunction to restrain the presentation of a winding up petition, in the following words:
>
> I agree with the reasons given by the English and New Zealand Court of Appeal respectively and by Abdul Malik J and hold that for the purpose of obtaining an interim injunction to restrain the defendant from proceeding with the winding up petition, the burden of proof cast on the plaintiff is only discharged by reference to the standard of proof or test in adducing evidence to establish a prima facie case and that the principle relating to the test of "serious question to be tried" in *American Cynamid Co. v. Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 as applied in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors*

A [1995] 1 CLJ 293 is not applicable as the applications there were not applications to restrain winding up petitions or proceedings, such as in the instant case before me.

Illustration of a *prima facie case may be provided by necessary evidence that there is a bona fide dispute by the plaintiff in relation to the* B *statutory demand or that the plaintiff is solvent* (emphasis added).

[26] To rehash on the issue before us, it is the right of a would-be petitioner to apply for a winding up order in appropriate circumstances, as that is a statute conferred right. It may be C restrained only in certain circumstances. To succeed, an injunction applicant must establish that the presentation of a winding up petition would be an abuse of the process of court. From the point of view of the presiding judge, before granting the injunction, he must address the issue whether he is satisfied that the evidence D adduced before him has established a *prima facie* case of an abuse of the process of the court eg, the debt is disputed (*Pengkalen Securities Sdn Bhd v. Leow Li Lain* [1997] 5 CLJ 440). If the applicant of the injunction fails to establish that *prima facie* case then no injunction is granted. On the above reasoning, the E guidelines of *American Cynamide Co. v. Ethicon Ltd* and *Keet Gerald Francis v. Mohd Noor* therefore would be out of sync with the current application, which seeks to stop proceedings *in limine*. It is my view too that the above principle would apply equally in an *ex parte* application for an injunction.

F

Conclusion On The Interim Injunction Application

[27] Granting of an injunction very much depends on the exercise of the discretion of the judge. Whether the adduced *prima facie* evidence is sufficient for the court to exercise that discretion will G depend on whether the grounds are clear and persuasive enough to satisfy the threshold level of a *prima facie* case. Sufficiency depends very much on the circumstances of each case. In *Malayan Flour Mill Bhd v. Raja Lope & Tan Co* [2000] 7 CLJ 288, the application was allowed. The court found that being a public listed H company, whose shares are traded on the KLSE Board, and in the event a winding up petition were presented, there was a risk that it would be impossible for the plaintiff to carry out its business activities. The winding up petition would cause irreparable damage to the plaintiff, its business, its credit reputation, and the I harm resulting out of the petition would be immeasurable and

beyond compensation by damages. The court further stated that, even if the plaintiff were to succeed in its appeal at the Court of Appeal, it was unlikely that any money paid out to the defendant would be recoverable. To maintain the *status quo* of the case injunction was granted.

[28] In *Sime Engineering Sdn Bhd v. RM Leopad Sdn Bhd (No 2)* [2005] 5 CLJ 274 the injunction application too was allowed. The court had opined that the very basic requirement that was needed to be established before issuing a notice of demand under s. 218 of the Companies Act 1965 was that one must be a creditor and that there are debts due to him, which the plaintiff failed to pay or neglected to pay. Regretfully the court found that, apart from a *bona fide* and substantial dispute on the defendant's alleged claim having been established, it had also failed to establish a debtor-creditor's relationship between itself and the plaintiff. In the circumstances of the case, there was an abuse of the court's process in that the intention of the defendant was to bring unwarranted pressure to bear on the plaintiff, to settle a vigorously and cogently disputed debt.

[29] In *Tan Kok Tong v. Hoe Hong Trading Co. Sdn Bhd* [2007] 2 CLJ 305 (a case quite similar to the present one) the Court of Appeal had stated that every court has inherent jurisdiction to prevent an abuse of its process. It is an abuse of the court's process when the process of the court is invoked not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose to oppress or exert pressure on the other party in order to achieve an improper end. The court further stated that, usually a court acts against an abuse of its process after proceedings have been commenced, but in a case involving winding up of a company, intervention after the commencement of proceedings would often be too late and thus justified the court's interference even before its commencement. The court had also specified that the test to be applied before granting an injunction to restrain a winding up petition, based on statutory demand for a debt, is that there must be *bona fide* disputed debt on substantial grounds and it is not enough that there be serious questions to be tried.

The Disputed Debts Here

[30] The respondent disputed the debt claimed by the appellant pertaining to the sum of RM3,371,251.17 under certificate No. 42, premised on three grounds *viz.*:

A i. a claim of **liquidated damages** pursuant to the delay of the completion;

ii. entitlement to damages due to the appellant's breach of the contract, and it being responsible to compensate the
B respondent for the termination of their contract; and

iii. the right of **set-off** for the direct payment it made to the appellant's sub-contactor and suppliers, and set-of for all the counter claims.

C **[31]** Beefing up the above assertions, the respondent had asserted that as a result of the appellant's failure to complete the works under the contract within the contractual period, the respondent was entitled to impose liquidated and ascertained damages (LAD) on the appellant. The rate was RM10,000 per day per block
D pursuant to cl. 22 of the contractual agreement and cl. 10 of the letter of award dated 22 July 2002. As the appellant had failed to complete the works pursuant to letter dated 13 March 2006 replacement contractors were engaged to complete the unfinished works. The respondent intended to claim from the appellant all the
E losses and expenses resulting from that said repudiation by arbitration under cl. 34. The respondent also intended to claim a refund of compensation payment to amounting to RM1,400,000 under the settlement agreement dated 29 July 2005 pursuant to cl. 2.8.

F **[32]** To counter the respondent's submission that it could deduct certain sums of money, set-off in particular the appellant had adverted to cl. 30.3(i) to reject that right. This provision reads:

G > *Unless otherwise expressly provided in these Conditions, the Employer shall not be entitled to withhold or deduct any amount* certified as due under any Architect's certificates *by reason of any claims to set-off* or counterclaims or allegation of defective work, materials or goods *or for any other reasons whatsoever* which he may purport to excuse him from making payments of the amount stated to be due in an
H > Interim Certificate.

[33] The appellant would have been home and dry if not for the following provisions in the agreement, and they are:

I

[34] Clause 27.4, which reads:

> The Architect, at any time before the issuance of the Final Certificate, may request the Contractor to furnish to him reasonable proof that all amounts stated as due and included in the previous certificates in respect of the total value of the work executed, materials or goods supplied by the Nominated Sub-Contractor have been discharged. If the Contractor fails to comply with any such request, the Architect may issue a certificate to that effect and thereupon *the Employer may himself pay such amounts to any Nominated Sub-Contractor concerned and deduct the same from any sums due or to become due to the Contractor.* When the Architect is of the opinion that it is appropriate to do so, he may issue the aforesaid certificate irrespective of whether or not an Interim Certificate under Clause 30.0 is due for issuance.

[35] Further cl. 22.1 reads:

> If the Contractor fails to complete the Works by the Date for Completion or within any extended time fixed under Clause 23.0 or sub-clause 32.1(iii) and the Architect certifies in writing that in his opinion the same ought reasonably so to have been completed, then the Contractor shall pay to the Employer a sum calculated at the rate stated in the Appendix as *Liquidated and Ascertained Damages (LAD)* for the period from the Date for Completion or any extended date where applicable to the date of Practical Completion. *The Employer may deduct such sum as a debt from any monies due or to become due to the Contractor under this Contract.*

[36] To complete it, under cl. 30.5(ii) in the event the employer wishes to deduct any sum, the contractor must be informed in writing. This provision reads:

> When the Employer exercises any right under this Contract to deduct from any monies due to or become due to the Contractor he shall inform the Contractor in writing of the reason for that deduction.

[37] Pursuant to the abovementioned provisions it is obvious that the respondent may set-off any sums of monies in certain circumstances. Is there any evidence of actual sums paid out by the respondent on behalf of the appellant to suppliers or its sub-contractors? From the correspondences, I was satisfied that there existed a history of payments made by the respondent at the request of the appellant. Below I reproduce one of the many letters where the appellant had requested the assistance of the respondent to pay on its behalf (see amongst them appeal record 1326, 1327 and 1330 vol. 15):

Our ref: WFE/CONNAUGHT/465-05

24th January 2006

CONNAUGHT HEIGHTS SDN.BHD.

No. 26, Jalan Klang Midah.
Taman Midah, Cheras,
56000 Kuala Lumpur.
Malaysia.

Attn: Mr. C.L. Chong

Dear Sirs,

Proposed Construction Of 3 Blocks Of 850 Units Of Medium Cost Apartment, 2 Blocks Of 378 Units Of Low Cost Flats, Infrastructure Services And Amenities Of Part Of Lot 18112, Mukim Petaling, Wilayah Persekutuan

Payment On Behalf Of Westform Far East Sdn Bhd

We refer to our letter reference WFE/CONNAUGHT/404-05 dated 24th January 2006 and Yi Sing Enterprise Sdn Bhd's letter dated 23rd January 2006 pertaining to the above captioned matter.

Kindly make payment to Yi Sing Enterprise Sdn Bhd amounting to RM141,915.00 on our behalf and deduct the same from us accordingly. Your attention on the above matter is very much appreciated. Please do not hesitate to contact us should you need further information.

Thank you.

Yours faithfully,
Westform Far East Sdn. Bhd.

T.H. KOH
Deputy C.E.O.

[38] The respondent argued that there were also *bona fide* disputes on substantial ground with regard to the sum of RM711,993.69 for the alleged financing costs. Essentially, there were no sums owing to the appellant, on account of there being no facility or financing agreement entered into between them. The appellant's claim for the financing costs was purportedly made under cl. 9 of the letter of award but yet there were no further details to support or to prove the said financing costs. In fact the respondent opined that the arbitration process should be adhered to as agreed upon.

[39] As regards whether the respondent was insolvent, I found the evidence adduced by the appellant rather sketchy at best. The only acceptable evidence to show its insolvency was an audited report adduced by the appellant obtained from the Companies Commission of Malaysia for year 2004 (RR vol. 13 p. 1137), proof of which was not contemporaneous to the debt indicated in the demand letter. The fact that in 2006 the appellant was still requesting the respondent to pay on its behalf the sub-contractors and suppliers (and the respondent did pay) made short shrift of the above 2004 audited accounts. If I may add, even though these appeals have been postponed a few times the respondent have yet to receive any winding up petition from any dissatisfied creditor, thus deriding any suggestion of insolvency.

[40] From the totality of the evidence there was clearly a genuine dispute as to the debts in question as explained above, let alone the insolvency of the respondent was never established adequately. I was thus satisfied that the learned judge had exercised his discretion correctly in granting the order, not only for the *ex parte*, but also the *inter partes* applications. As said above, an appellate court will rarely interfere with an exercise of discretion unless the trial judge has erred in law or if the trial judge has failed to take into account highly relevant considerations. Here I failed to detect that error.

[41] We accordingly dismissed appeals W-03-212-2006, W-03-213-2006, W-03-214-2006, and W-03-215-2005 with costs.

[42] My brother Azhar Haji Ma'ah, JCA has perused this draft and agreed with the contents.

Hishamudin Mohd Yunus JCA:

Introduction

[43] In this judgment, as a matter of convenience, I shall be referring to the appellant (Westform Far East Sdn. Bhd.) as 'the defendant', and the respondent (Connaught Heights Sdn. Bhd.) as 'the plaintiff'.

[44] There are four inter-related appeals heard together before this court, namely:

(1) Civil Appeal No. W-03-212-2006;

(2) Civil Appeal No. W-03-213-2006;

(3) Civil Appeal No. W-03-214-2006; and

(4) Civil Appeal No. W-03-215-2006.

[45] The first appeal (Civil Appeal No. W-03-212-2006, relating to High Court of Kuala Lumpur Originating Summons No: D5-24-307-2006) is an appeal by the defendant against the learned High Court Judge's order of 20 November 2006, which granted the plaintiff an *inter partes* interlocutory injunction order restraining the defendant from presenting a winding-up petition against the plaintiff pursuant to a notice issued under s. 218(1)(e) of the Companies Act 1965 ('the Companies Act') for the (allegedly) non-payment of a debt of RM3,371,251.17.

[46] The second appeal (Civil Appeal No. W-03-213-2006, relating to High Court of Kuala Lumpur Originating Summons No: D5-24-307-2006) is an appeal by the defendant against the learned High Court Judge's order of 20 November 2006 refusing to set aside an *ex parte* interlocutory injunction order granted to the plaintiff on 25 August 2006. The *ex parte* interlocutory injunction order of 25 August 2006 restrained the defendant from presenting a winding-up petition against the plaintiff pursuant to a notice issued under s. 218 of the Companies Act for the (allegedly) non-payment of the aforesaid debt of RM3,371,251.17;

[47] The third appeal (Civil Appeal No. W-03-214-2006, relating to High Court of Kuala Lumpur Originating Summons No: D5-24-306-2006) is an appeal by the defendant against the learned High Court Judge's order of 20 November 2006 dismissing the defendant's application to set aside an *ex parte* interlocutory injunction order of 25 August 2006 granted to the plaintiff. The *ex parte* interlocutory injunction order of 25 August 2006 restrained the defendant from presenting a winding-up petition against the plaintiff pursuant to a notice issued under s. 218(1)(e) of the Companies Act for the (allegedly) non-payment of a debt of RM711,993.69.

[48] The fourth appeal (Civil Appeal No. W-03-215-2006, relating to High Court of Kuala Lumpur Originating Summons No: D5-24-306-2006) is an appeal by the defendant against the learned High Court Judge's order of 20 November 2006, which granted an inter partes interlocutory injunction order restraining the defendant from presenting a winding-up petition against the plaintiff pursuant to s. 218(1)(e) of the Companies Act in respect of the aforesaid alleged debt of RM711,993.69.

[49] I am allowing the defendant's appeals pertaining to the *ex parte* interlocutory orders, namely, appeals Nos. (2) and (3) (with costs to the defendant). A

[50] But I am dismissing the defendant's appeals pertaining to the *inter partes* interlocutory orders, namely, appeals Nos. (1) and (4) (with costs to the plaintiff). B

[51] I shall now give my grounds.

The Background Facts

C

[52] I shall begin by setting out a brief account of the background facts. The plaintiff company, Connaught Heights Sdn. Bhd., is a housing developer doing a housing development project at Lot 18112, Mukim of Petaling, Kuala Lumpur. The defendant company, Westform Far East Sdn. Bhd., is the main contractor of D the plaintiff for the purpose of the project. The defendant was appointed by the latter *vide* a letter of award dated 22 July 2002. The essential terms of the letter of award have been set out by my learned brother Suriyadi Halim Omar JCA in his majority judgment, and I do not propose to repeat them. The contract was E signed by the parties on 23 March 2004.

[53] In the course of the execution of the works, several disputes arose between the parties resulting in them entering into a Supplemental Agreement on 29 July 2005. A brief description of F the essential terms of the Supplementary Agreement has already been touched upon by the majority judgment.

[54] The dateline for the completion of the works was extended by the Supplemental Agreement to 31 December 2005. But the defendant failed to complete the works by this extended dateline. G As a result, the architect issued a Certificate of Non-Completion on 24 January 2006.

[55] The defendant purported to terminate the contract pursuant to cl. 26.1 (i) of the Conditions of Contract *via* a notice dated 9 H March 2006. This repudiation was accepted by the plaintiff *via* their letter of 13 March 2006.

[56] Now, coming to the issues, the defendant made two claims against the plaintiff pursuant to works done under the contract. I The first claim is for a sum of RM3,371,251.17 in respect of an architect issued Interim Certificate No. 42 dated 27 February

2006. The plaintiff disputed this claim and refused to make any payment in respect of this Interim Certificate; and as a result the defendant on 7 August 2006 issued a notice of demand pursuant to s. 218(1)(e) of the Companies Act 1965.

[57] The second claim by the defendant is for a sum of RM711,993.69 being allegedly finance costs and charges incurred by the defendant in respect of loan facilities that the defendant had obtained from the bank for the purpose of the project under the contract. These costs and charges were incurred from December 2003 to April 2005 as a result of delay on the part of the plaintiff in making payments to the defendant for works done. The plaintiff's liability to pay (so alleged by the defendant) is confirmed in the defendant's letter to the plaintiff dated 20 July 2002. It is alleged by the defendant that, by virtue of cl. 5 of the letter of award, this letter forms part of the contract between the parties. The plaintiff disputed the defendant's claim and refused to make any payment. So, the defendant's solicitors served on the plaintiff a notice of demand under s. 218(1)(e) of the Companies Act on 7 August 2006.

[58] So, there were two s. 218 notices issued to the plaintiff by the defendant. The plaintiff's solicitors responded to the defendant's solicitors on 11 August 2006 disputing the claims, and further contending that the disputes ought to be referred to arbitration.

[59] On 18 August 2006 the plaintiff filed at the High Court of Kuala Lumpur two originating summons against the defendant in respect of the two s. 218 notices issued by the defendant, namely:

(a) Originating Summons No: D5-24-307-2006 (in respect of the defendant's s. 218 notice demanding a sum of RM3,371,251.17); and

(b) Originating Summons No: D5-24-306-2006 (in respect of the defendant's s. 218 notice demanding a sum of RM711,993.69).

[60] By these two originating summons, the plaintiff seeks injunction orders to restrain the defendant from presenting winding-up petitions against the plaintiff pursuant to the two s. 218 notices.

[61] Pending the hearing of the originating summons, the plaintiff sought interim reliefs by filing on the same day (18 August 2006) *ex parte* summons in chambers seeking *ex parte* interlocutory injunction orders to restrain the defendant from presenting winding-up petitions pursuant to the two s. 218 notices. The plaintiff succeeded in obtaining the *ex parte* interlocutory orders on 25 August 2006.

[62] Thereafter, after an *inter partes* hearing of the interlocutory applications (which were heard together), on 20 November 2006 the High Court granted to the plaintiff the *inter partes* interlocutory injunction orders; and, simultaneously, refused to set aside the defendant's applications to set aside the *ex parte* interlocutory orders.

[63] Hence we now have the defendant's appeals to the Court of Appeal.

The Two Appeals That I Am Allowing

[64] I shall begin with my decision in respect of the defendant's appeals pertaining to the *ex parte* interlocutory orders, namely, appeals Nos. (2) and (3).

[65] I am allowing appeals Nos. (2) and (3) by the defendant in respect of the *ex parte* interlocutory orders for two reasons. Firstly, by reason of O. 29 r. 1(2) of the Rules of the High Court 1980 ('the RHC'), an *ex parte* application for an interlocutory injunction must be made only in exceptional circumstances. The case must be one of urgency. Subrule (2) of r. (1) of O. 29 stipulates:

> (2) Where the applicant is the plaintiff and the case is one of urgency such application may be made *ex parte* by summons supported by an affidavit but, except as aforesaid, such application must be made by summons.

[66] Do note the words 'the case is one of urgency'. The legal burden is on the applicant (and in the present case, it is the plaintiff) to convince the court that the case is one of urgency. It is not for the respondent/defendant to show to the court that the case is not one of urgency. In *Permodalan MBf Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors.* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 Syed Agil SCJ, delivering the judgment of the Supreme Court, said (at p. 246):

> We would like to express our view on the issue of the *ex parte* injunction at the instance of the respondents or the defendants in the Court below which was granted by the Judge on 22 November 1986. Although O. 29 r. 1(1) RHC 1980 enables any party to apply for an injunction either before or after trial of an action, O. 29 r. 1(2) therefore allows the plaintiff to apply for an *ex parte* injunction by summons supported by an affidavit, but only in the case of urgency. No such provision was included in the former Supreme Court Rules 1957 dealing with the same matter under O. 50. Order 29 is therefore a new provision introduced in the RHC which superceded the RSC 1957 by repeal as provided under O. 93 r. 1(a) of the former since 1 June 1980. In our opinion, an application for injunction under O. 29 r. 1(1) has to be heard *inter partes* thus enabling either the plaintiff or the defendant to apply 'whether or not a claim for injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be'. On the other hand, an *ex parte* application under sub-rule (2) may be made by the plaintiff and only in a case of urgency. Inter-party hearing appears to be the rule while an *ex parte* application for injunction appears to be the exception in the circumstances provided by sub-rules (2) and (3) and is to be allowed only in cases of urgency on the application of the plaintiff.

[67] The court must examine the justification given by the applicant (who bears the legal burden) critically always bearing in mind that an *ex parte* interlocutory injunction order is drastic in nature. The Court must constantly be vigilant; otherwise the procedure is likely to be abused. Indeed, from my judicial observation it is frequently abused by litigants. In the present case, the plaintiff/applicant, to my mind, has failed to show to the court that the case was one of urgency. All that the plaintiff says in subparagraph (c) of para 34 of their supporting affidavit is:

> (c) As the Plaintiff only has a limited time, that is, until 28.8.2006 to obtain this injunction, the Plaintiff did not have time to inform the Defendant of this application for an injunction. If the defendant was informed of this application, and was to file affidavits to oppose it, this application would certainly not be heard before the said 21-day period expires. For this reason, this application for an injunction has to be heard *ex parte* in the first instance even though the Defendant's solicitors in their letter dated 14.8.2006 at Exhibit "CCL-14" requested to be kept informed of any proceedings or applications filed against the Defendant.

[68] The above explanation is highly unsatisfactory. In the first place, there seems to be some confusion in the explanation. What does the plaintiff mean by the words 'this application' in the first and second sentences of the above subparagraph? Does the plaintiff mean an *inter partes* application; or does the plaintiff mean an *ex parte* application? If what the plaintiff meant by 'this application' is an *inter partes* summons in chambers (and this appears likely to be so if one were to read the whole subparagraph in its entirety) for an interlocutory injunction order, then, why did the plaintiff say in their explanation that they did not have time to inform the defendant of the application? To be more precise, what is meant by 'inform'? In preparing their affidavit the plaintiff had the benefit of solicitors' advice and as such ought to have known that an *inter partes* summons in chambers legally must be served on the other party: one does not merely inform the other party of the application. So why does the plaintiff take the position that in an *inter partes* situation their duty is only to inform the other side of the application and not to serve the application on the same? Since the plaintiff has had the benefit of solicitors' advice in preparing the affidavit, they could not have been that ignorant of the law. This duty to explain cannot be discharged in a cavalier manner.

[69] Be that as it may, assuming that the subparagraph is a muddled attempt to explain why the application was made *ex parte* and not *inter partes*, still, to my mind, since the plaintiff has 21 days to make the interlocutory application for an interlocutory injunction (the plaintiff was served with the s. 218 notice on 7 August 2006, and had 21 days to comply or to take any legal proceeding they deemed fit), it cannot be the truth for the plaintiff to say that they did not have time to make the application *inter partes*. The period of 21 days is relatively a long time. Clearly there was ample time to make an *inter partes* application. Clearly there was no urgency at all.

[70] In the alternative, if the above subparagraph is also to be taken as an explanation as to why, having made an *ex parte* application, the plaintiff decided not to notify the defendant of the application, then, to my mind, such an explanation is equally unacceptable. The *ex parte* application was filed on 18 August 2006 but it was not heard immediately: it was only heard on 25 August 2006, that is to say, seven days later. Thus the plaintiff

had ample time to notify the defendant of their *ex parte* application. In an *ex parte* application, the application need not have to be served on the other side: one needs only to inform the affected party; and in an extreme situation, the other party could even be informed by means of a mere phone call (of course, prudence requires that the notification, where possible, be in writing and acknowledged).

[71] If the plaintiff had informed the defendant of their *ex parte* application, the latter would have had the opportunity to be present in court on the hearing day of the *ex parte* application and, if the defendant had so wished, to apply to the court for the *ex parte* application to be heard on an *ex parte* opposed basis, which will not involve the filing of any affidavit by the defendant. In other words, it does not mean that where the other party is informed of the *ex parte* then the *ex parte* would automatically become an *inter partes* application. An *ex parte* application will, throughout, remains an *ex parte* application – until ordered by the court to be *inter partes*. In the present case, the duty on the part of the plaintiff to inform the defendant becomes all the more imperative if one were to take into account of the fact that the defendant's solicitors had on 14 August 2006 already given notice to the plaintiff's solicitors that the defendant required to be given notice of any application made by the plaintiff in respect of the s. 218 notice.

[72] Now, it will be recalled that the plaintiff in subparagraph (c) of their affidavit, in attempting to justify why they did not make their application *inter partes*, says:

> If the defendant was informed of this application, and was to file affidavits to oppose it, this application would certainly not be heard before the said 21-day period expires.

[73] The above explanation has no merit at all. In the first place, assuming that the word 'application' in the above explanation were to mean an *inter partes* interlocutory application, it is presumptuous as well as a sweeping statement to say that such an application could not be heard within the 21 days if the defendant were to file affidavits in opposition. It must be borne in mind that the proceeding is solely under the control of the High Court Judge in question. Neither the plaintiff nor the defendant can dictate on the timing of the hearing or of the filing of affidavits. If the plaintiff were not to delay their *inter partes*

application but instead were to file in the *inter partes* application fairly early under a certificate of urgency – and they are duty-bound to make the application promptly and not to dilly dally – as I see it, there should not be any difficulty for the judge to fix a date of hearing well within the 21-day period.

[74] My second reason for allowing the two appeals (appeals Nos. (2) and (3)) is that, when the plaintiff made the *ex parte* applications before the High Court, there had been non-compliance by the plaintiff with the mandatory requirement of O. 29 r. 1(2A)(c) of the RHC. Order 29 r. 1(2A)(c) stipulates:

> (2A) The affidavit in support shall contain a clear and concise statement:
>
> (c) of the facts relied on as justifying application *ex parte*, including details of any notice given to the defendant or, if none has been given, the reason for giving none;

[75] What the above provisions mean is that as a rule the plaintiff was under a duty to notify the defendant of their *ex parte* application. As a rule, the giving of notice is mandatory. It is only in exceptional circumstances that the plaintiff is excused from notifying the defendant of their *ex parte* application. And even then, in a situation where the plaintiff decided not to inform the defendant of their *ex parte* application, the plaintiff must in their affidavit justify to the court as to why such notice was not given. In my judgment, the words 'the reason for giving none' in subparagraph (c) of subrule (2A) mean that it is mandatory for the plaintiff to give a plausible reason, and not just any reason. The explanation cannot be just a matter of lip service. To my mind, in the present case, upon examining subparagraph (c) of para 34 of the plaintiff's affidavit critically, which I have done in the earlier part of this judgment, no plausible reason has been given by the plaintiff. The explanation is not only confusing but mere lip service in nature.

[76] In my judgment in *University of Malaya Medical Centre v. Choo Chee Kon & Anor* [2008] 5 CLJ 295 (referred to by the learned counsel for the defendant, and conceded by the learned counsel for the plaintiff to have been correctly decided on the facts) I had said:

A In my judgment, compliance with r. 1(2A)(c) is mandatory. If there had been non-compliance, it is a very serious breach of the Rules of the High Court and the *ex parte* order must be set aside. This approach is consistent with the policy behind the introduction of r. 1(2A). I therefore, set aside the *ex parte* injunction order due to non-compliance of r. 1 (2A)(c) of the RHC.

B

[77] In the case cited, I had referred to the *Malaysian High Court Practice*, 2001 Desk Edition 1. At p. 1032 the learned author states:

C The requirements in r. 1(2A) are mandatory. Thus, where a plaintiff fails to give notice of an application made *ex parte* out of fear that it will defeat the purpose of the proceedings, the plaintiff must state in his supporting affidavit the reasons why notice in advance was not given to the defendant. As the introductory sentence in r. 1(2A) states that the affidavit 'shall contain a clear and concise statement', the statement must be stated clearly and concisely and may not be implied: *Delimec Hygiene Sdn Bhd v. EMIC (M) Sdn Bhd* [2001] 5 MLJ 186 at 197.

D

The consequence of the plaintiff's failure to comply with r. 1(2A) is that the injunction must be discharged. To do otherwise would defeat the policy behind the introduction of r. 1(2A): *UMAS Sendirian Berhad v. RHB Bank Berhad & Anor* [2001] 1 AMR 1024.

E

[78] To conclude on this *ex parte* issue, in my judgment, in the F present case, the learned High Court Judge, with respect, ought to have set aside the *ex parte* orders.

[79] I accept the submission of the learned counsel for the appellant that the policy behind the introduction of O. 29 r. 1(2A) is to ensure that *ex parte* injunctions are not granted willy-nilly, but G only in cases where they are truly necessary, and to ensure that the policy is not defeated, the courts must demand strict compliance with its terms (see *Motor Sports International v. Delcont (M) Sdn Bhd* [1996] 3 CLJ 483).

H

The Two Appeals That I Am Dismissing

[80] I shall now move on to deal with the remaining two appeals namely appeals Nos. (1) and (4), that is to say, the defendant's appeals in respect of the two *inter partes* interlocutory injunction I orders. As I have said earlier, I have dismissed these two appeals. I shall begin with the basic principles governing interlocutory

applications to restrain the presentation of winding up petitions. It hardly needs saying that a court of law must respect and protect the defendant's right to file the winding up petitions – a right conferred by statute, namely, s. 218 of the Companies Act - if the defendant honestly believes that they have the right to do so, so long as the exercise of such a right is not an abuse of process. This basic principle was laid down in *Bryanston Finance Ltd v. De Vries (No. 2)* [1976] 1 All ER 25, a decision of the English Court of Appeal, wherein Buckley LJ said:

> It has long been recognised that the jurisdiction of the court to stay an action in limine as an abuse of process is a jurisdiction to be exercised with great circumspection and exactly the same consideration must apply to a *quia timet* injunction to restrain commencement of proceedings. These principles are, in my opinion, just as applicable to a winding up petition as to an action. The right to petition the court for a winding up order in appropriate circumstances is a right conferred by statute. A would be petitioner should not be restrained from exercising it except on clear and persuasive grounds.

[81] However, a would-be petitioner can be restrained by the court where the circumstances are such that he ought to be so restrained in the interest of justice. In *Bryanston Finance* Buckley LJ explains the guiding principle in the following manner:

> In his speech in the *American Cyanamid* case [1975] AC 396 Lord Diplock recognised that there might be special factors to be taken into consideration in the particular circumstances of individual cases. In my judgment, the fact that the second action is an action designed to prevent the commencement of proceedings *in limine* is such a special factor. In such a case the court should not, in my judgment, interfere with what would otherwise be a legitimate approach to the seat of justice unless the evidence is sufficient to establish *prima facie* that the plaintiffs will succeed in establishing that the proceedings sought to be restrained would constitute an abuse of process. In the present case, in my opinion, this has not been achieved. I would consequently allow the appeal in the second action and discharge the injunction of May 15, 1975.

[82] In short, the above judgment enunciated the 'abuse of process' principle. But it is pertinent to note from the above passages that the party who alleges that *prima facie* there is an abuse of process (and in the context of the present case, it is the plaintiff) must satisfy this court with 'clear and persuasive grounds'.

[83] In enunciating the above principles, the English Court of Appeal also makes it clear that the *American Cyanamid* principles (see *American Cyanamid Co. v. Ethicon Ltd.* [1957] 1 All ER 504) do not apply in interlocutory applications to restrain the presentation of a winding-up petition.

[84] The principles in *Bryanston Finance* have been followed by our courts. I, too, as a High Court Judge had applied the principle recently in *Homestead Assets Sdn. Bhd. v. Contramec Sdn. Bhd.* [2009] 8 CLJ 227.

[85] Thus, in the case now that is before me, the question arises: would the presentations of the intended winding up petitions by the defendant (in the light of the service of the s. 218 notices on the plaintiff) be abuses of process?

[86] In my judgment, on the evidence and the facts, the plaintiff has succeeded in satisfying this court that the intended petitions, if proceeded with by the defendant, would *prima facie* constitute abuses of process.

[87] I shall begin with the defendant's claim for RM711,993.69. This claim is obviously on weak grounds. The defendant based their claim on cl. 9 of the letter of award dated 22 July 2002. But this clause does not seem to support the defendant's claim. Clause 9 merely says as follows:

> 9. PAYMENTS
>
> (a) The period of interim certificates shall be 1 month and the period of honouring certificates shall be by the S. O.
>
> (b) As agreed, you might [be] required to part finance the construction of the elevated car parks for the medium cost apartments. The agreed rate levied for late payments shall be based on actual prevailing bank interest.

[88] Clause 9(b) above merely refers to the possibility of the defendant financing part of the works but in actual fact there was no financing agreement entered into by the parties for this purpose. Moreover, the details of the defendant's claim for financing costs do not show any connection to the construction of elevated car parks for medium costs apartments.

[89] It is the contention of the defendant that their claim for the sum of RM711,993.69 was, in any event, undisputed and/or has been accepted by the plaintiff by conduct. According to the defendant, the plaintiff had failed to reply to the defendant's letter of 25 May 2005 and as such must be taken to have accepted, by conduct, the defendant's claim. As I see it, the true position in law is that failure to reply or silence does not mean that the claim is admitted or undisputed. The fact that the plaintiff ignored the claim shows that the defendant's claim is disputed.

[90] Next, I shall deal with the defendant's s. 218 notice to the plaintiff pertaining to the claim for a sum of RM3,371,251.17. This, too, to my mind is an abuse of process.

[91] On the affidavit evidence, *prima facie*, by the time certificate No. 42 was issued, the defendant was already heavily indebted to the plaintiff for liquidated ascertained damages (LAD), for direct payments to suppliers, and for repayment of compensation. As such, the s. 218 notice is misleading and is an abuse of process.

[92] On LAD, there was a delay on the part of defendant in completing the project, in spite of the fact that the completion date was extended to 31 December 2005. The plaintiff had quantified the sum owing by reason of the delay and the consequential LAD as RM1,380,000.

[93] In respect of direct payments to suppliers made by the plaintiff with the consent/authorization of the defendant, the sum owing by the defendant to the plaintiff, as quantified by the plaintiff, is RM1,466,809.36.

[94] And as for the repayment of compensation, pursuant to cl. 2.9 of the Supplementary Agreement, the compensation paid by the plaintiff to the defendant was RM1.4 million. However, according to cl. 2.8 of the same Agreement, the defendant is under an obligation to refund this amount if they were to terminate the contract. *Prima facie*, the defendant had unlawfully terminated the contract. Hence they must refund to the plaintiff the sum of RM1.4 million.

[95] Clause 2.1 and cl. 27.4 of the Conditions of Contract allow the plaintiff to set off any claims the plaintiff has against any Interim Certificate.

[96] The defendant, in contending that the plaintiff does not have a right of set-off against their Interim Certificate No. 42, attempts to rely on cl. 30.3(i) of the Conditions of Contract, but as pointed out by the learned counsel for the plaintiff in his submission, the defendant could not rely on cl. 30.3(i) since this clause begins with the qualification 'Unless otherwise expressly provided in these Conditions ...'.

[97] To conclude on this *inter partes* issue, I would hold that the affidavits evidence, *prima facie*, shows that it is the defendant who was owing money to the plaintiff and not the other way round. Hence it was legally wrong for the defendant to have issued to the plaintiff the s. 218 notices.

[Civil Appeal No. W-03-213-2006 and Civil Appeal No. W-03-214-2006 allowed with costs; Civil Appeal No. W-03-212-2006 and Civil Appeal No. W-03-215-2006 dismissed with costs]